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IN THE

Supreme Court of the United States

OCTOBER TERM—1941

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT OF PETITION

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SUBJECT INDEX

	PAGE
Petition for a Writ of Certiorari	1
Statement of Matters Involved	2
Jurisdiction	13
Questions Presented	13
Statutes Involved	14
Reasons for Allowance of Writ	16
Brief in Support of Petition	19
Opinions Below (reprint in Appendix)	19
Jurisdiction	19
Statement of the Case	19
Specification of Assigned Errors to be Urged	20
Argument	20
I. It was error to hold that because petitioners were not parties to the telephone communications intercepted and divulged in violation of Section 605 of the Federal Communications Act, they have no standing to complain of that violation	20
II. It was error to hold that Section 605 of the Federal Communications Act does not prohibit the use upon the trial of evidence obtained by unlawful interception and divulgence in advance of trial of telephone conversations as against defendants who were not parties to the communications	25

PAGE

III. The Court below erred in holding that the District Court did not unduly limit the scope and conduct of the preliminary hearing 27

IV. The Court below erred in holding that the charge of the District Court was not prejudicial to the rights of these petitioners 28

Conclusion 30

Appendix:

Opinion in Circuit Court of Appeals for the Second Circuit 31

TABLE OF CASES CITED

Connolly v. Medalie, 58 F. (2d) 629 22

Murdock v. United States, 290 U. S. 389 (1933) 13

Nardone v. United States, 302 U. S. 379 (1937) .. 16, 23, 24

Nardone v. United States, 308 U. S. 338 (1939) .. 3, 8, 10, 14, 16, 20, 22, 23, 25, 26, 27

Nardone v. United States, 106 F. (2d) (1941) 22

Olmstead v. United States, 227 U. S. 438 (1928) 22

Quercia v. United States, 289 U. S. 466 (1933) 13, 29

Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920) 16, 26

Weeks v. United States, 232 U. S. 383 (1914) 23

Weiss v. United States, 308 U. S. 321 (1939) 2, 5, 16, 20, 21, 23

PAGE

United States v. Bernava, 95 F. (2d) 310 (C. C. A. 2nd, 1938) 21

United States v. Seeman, 115 F. (2d) 371 (C. C. A. 2nd, 1940) 21

United States v. Weiss, 103 F. (2d) 348, (C. C. A. 2nd, 1939) 2, 7

United States v. Weiss, 34 Fed. Supp. 19 (S. D. N. Y. 1940) 3

STATUTES CITED

Constitution of United States:
Fourth Amendment 22, 23

Federal Communications Act (Ch. 652, 48 Stat. 1064, 1103; U. S. C. Title 47, Section 605) 2, 8, 13, 14, 15, 16, 20, 21, 22, 23, 24, 25, 26, 28

Section 240 (a) Judicial Code, as amended, U. S. C. Title 28, Section 347 ..... 13, 19

18 U. S. C., Section 88 1

18 U. S. C., Section 338 1

U. S. C. C., Section 215 1

U. S. C. C., Section 37 1

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DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH,

Petitioners,

—against—

UNITED STATES OF AMERICA;

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Dr. Maximilian Goldstein, Dr. Benjamin Schwartz, Herman Rubin and Irving Elentuch, respectfully pray for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment of that Court entered on June 18th, 1941, affirming a judgment of the District Court of the United States for the Southern District of New York, entered on July 30, 1940, convicting the petitioners of the crimes of using the mails to defraud, in violation of 18 U. S. Code, Section 338, U. S. C. C. Section 215, and of conspiracy to commit an offense against the United States, to-wit, to use the mails to defraud, in violation of 18 U. S. C., Section 88, U. S. C. C. Section 37.

Statement of Matters Involved.

Petitioners, with others, were indicted on thirty counts, twenty-nine of which charged petitioners with using the mails pursuant to an alleged scheme to defraud life insurance companies by inducing them to pay false claims for disability and health and accident benefits under insurance policies. The thirtieth count charged petitioners with conspiracy to do so. The alleged conspiracy and scheme to defraud charged in the indictment covered a period from June 1, 1931, to and including the date of the filing of the indictment on March 22, 1940.

Petitioner Goldstein was convicted on counts "17", "18", "21"-"25" and "30." Petitioner Schwartz was convicted on counts "3", "12-13", "24-25" and "30". Petitioner Rubin was convicted on counts "24-25" and "30". Petitioner Elentuch was convicted on counts "19-20" and "30". The jury recommended leniency.

A brief summary of certain proceedings which took place prior to the trial of this action is essential to an understanding of the issues here presented.

In 1938 petitioner Goldstein, together with one Joseph J. Weiss and others, was tried for a similar crime. In the course of that trial the Government introduced evidence of intrastate telephone conversations obtained by interception ("wiretapping") carried out under the supervision of federal agents. All the defendants were convicted, and the Circuit Court of Appeals for the Second Circuit affirmed their conviction. (*U. S.* v. *Weiss, et al.*, 103 F. (2) 483 (C. C. A. (2) 1939).) This Court, however, reversed the conviction upon the ground that Section 605 of the Federal Communications Act (L. 1934, Ch. 652, 48 Stat. 1064, 1103; U. S. C., Tit. 47, §605) rendered such evidence inadmissible. *Weiss* v. *U. S.*, 308 U. S. 321 (1939).

Thereafter a new indictment was handed down against Weiss, petitioner Goldstein and others. At the opening of

the trial of that indictment the defendants, pursuant to the rule established by this Court in *Nardone* v. *U. S.*, 308 U. S. 338 (1939), applied to the trial court for the following relief:

(a) To suppress all records and transcripts of intercepted telephone messages.

(b) To direct the United States to submit to an examination with respect to the uses made by it of the intercepted messages and the facts ascertained by it from such use.

(c) To suppress all evidence obtained by the United States as a result of the use by it of said intercepted messages, and to suppress the testimony of all witnesses whose recollection was refreshed or whose testimony was aided by means of those messages.

The District Court conducted a preliminary hearing, at which various witnesses were examined, for the purpose of determining the extent to which the Government's evidence had been obtained, directly or indirectly, through the use of the forbidden "wire tapping". At the conclusion of the hearing, a decision was rendered. (*U. S.* v. *Weiss*, 34 Fed. Supp. 99 (S. D. N. Y. 1940).) Thereupon all the defendants in the *Weiss* case, except petitioner Goldstein, pleaded guilty. The Government then abandoned the *Weiss* case and moved the trial of the present indictment, known as the "*Garrow* indictment", to which the present petitioners were parties. This indictment arose out of the same investigation which had resulted in the prior *Weiss* indictment and in another, naming both Garrow and Weiss (R. 388).

Upon the opening of the trial of the present case petitioners made an application similar to that which had been made in the *Weiss* case (R. 103-108), and a similar preliminary hearing was held before the same District Judge.

Pursuant to stipulation (R. 114-115) portions of the testimony taken at the *Weiss* preliminary hearing were read into evidence. Certain additional witnesses were called. The Government conceded that "wire tapping" had been employed, and that approximately a thousand telephone communications had been intercepted and recorded. It is unquestioned that the consent of the "sender" was not obtained. During the course of the hearing the Court made various rulings with respect to the conduct of the hearing and the scope of the examination of witnesses of which petitioners complain and which are hereinafter discussed.

At the conclusion of the hearing the District Court rendered a decision granting the defendants' motion only to the extent of suppressing the actual records and transcripts of the intercepted communications (R. 613-615). Defendants duly excepted to the denial of the balance of their motion (R. 615).

The trial of the indictment then ensued. Petitioners contended that the two principal Government witnesses, Dr. Hirsch L. Messman and Elias Garrow, were incompetent to testify upon the ground that (1) they had been induced to plead guilty and to testify for the Government as the result of being confronted with records of their telephone communications which the Government had illegally intercepted, and (2) that their testimony had been strengthened and their recollections refreshed by the use of the records of the intercepted messages and by information derived from that source. The question of the competency of these witnesses was raised by appropriate objection and exception. (As to Messman, R. 962; as to Garrow, R. 2110; as to both, R. 5081-2.) The District Court permitted these witnesses to testify.

The principal claims of error which petitioners urged in the court below and which they urge here are (1) that Messman and Garrow should not have been permitted to testify,

(2) that the Court unduly restricted the scope of the preliminary hearing and unduly limited petitioners' examination of witnesses at that hearing, and (3) that the Court's charge to the jury was highly prejudicial to the rights of these petitioners.

I.

It may be noted that the Dr. Messman who testified here is the same Dr. Messman who testified for the Government in the *Weiss* case. In its opinion in that case, this Court took occasion to refer to the circumstances under which Messman became a Government witness as follows (308 U. S. 325):

> "It appeared at the trial that one of the defendants who pleaded guilty had been confronted with the phonograph records and then decided to plead guilty and become a witness for the Government. Others who had been informed of the Government's possession of the records did likewise."

This Court further stated, with reference to Messman, (p. 330):

> "Certain of the defendants who were participants in the telephone conversations were informed of the Government's possession of the contents of their communications. Under the stress of this situation they determined to turn state's evidence."

At the preliminary hearing in the case at bar, Messman was examined as to the circumstances under which he had decided to plead guilty. The record shows that upon his arrest in May 1937 he was brought before an Assistant United States Attorney (R. 128-35, 483-93) and that the latter said to him (R. 319) (Government's Exhibit BB for identification):

"That is exactly what we want. I am telling you before we go any further that there is no use of us kidding each other. *We have watched your telephone; we have watched all these lawyers' telephones; we have had rooms tapped. We know what is going on.* We are not stabbing in the dark. *If you want to hear your voice on a record we will be glad to play it.* In your instance, Doctor, there is so much to cover. You have been in this for so many years that we feel that in order for you to help yourself, since you are considered one of the principals here, it would be wise for you to indicate to us whether you intend to tell us everything and come clean, or whether you intend to play ball with the Garrows and the rest of the crowd. We feel that you can be of great value and you want to help yourself. That is straight talk." (Italics supplied.)

The record further shows that following this conversation Messman was put in a cell with other defendants, including one Benjamin Nelson. Nelson told him that he had been brought before the United States Attorney and that they had played a phonograph record of a telephone conversation in which he participated. They had also told him that this record was only a sample (R. 431). Nelson told Messman "They have an awful lot of evidence against us" (R. 431).

After this conversation with Nelson, Messman saw the United States Attorney and decided to confess (R. 432, *et seq.*).

The prosecutor, John F. Dailey, who testified in the preliminary hearing, stated that Messman had been advised of the existence of the intercepted messages "either for the purpose of getting him to plead guilty or to get him committed to one set of answers in case he decided to go to trial" (R. 159).

In view of these facts, it is manifest that no reliance can be placed on Messman's statement at the preliminary hearing that his decision to plead guilty was not influenced by his knowledge of the existence of the incriminating telephone conversations in which he had participated (R. 520). This is particularly apparent in view of the further facts that Messman was an admitted habitual and accomplished perjurer (R. 1263, 1265, 1271, 1300, 1301), and that he had been drawing a salary from the Government from the time of his arrest down to the date of his testimony in the case at bar (R. 967, 1278, *et seq.*).

With regard to Garrow the evidence which petitioners were able to adduce at the preliminary hearing was somewhat weaker. It did appear, however, that at the time Garrow pleaded guilty and decided to testify for the Government, he knew of the existence of the intercepted messages (R. 335). It is also significant that his decision to plead guilty was made within ten days after the Circuit Court of Appeals had held in the *Weiss* case, 103 F. (2) 348 (the decision later reversed by this Court), that intercepted intrastate telephone communications were admissible (R. 3013). In any event, the question of the extent to which the use of "wiretaps" induced Garrow's plea of guilty is no longer important; in view of the decision of the Court below with respect to the testimony of Messman.

The Circuit Court of Appeals held:

(1) That the testimony of Messman and Garrow "was so vital to the case that the convictions cannot survive if the prosecution should not have been permitted to call either" (Opinion, p. 1239).

(2) That the District Court should have forbidden the prosecution to call Messman "and probably Garrow as well, though as to him we need make no finding," on the ground that the Government failed to satisfy the burden which

rested on it of proving that the confrontation of these witnesses with the records of the intercepted messages had no substantial part in influencing them to plead guilty and testify for the Government. (Opinion, pp. 1241-2).

The Court affirmed the convictions, however, on the ground that petitioners had no right to complain of this use by the Government of the illegally intercepted telephone communications because petitioners were not parties to the communications thus used. The Court held that only persons who participate in conversations intercepted and divulged contrary to the provisions of Section 605 of the Communications Act have a standing to complain of the violation of that act.*

As an alternative ground for its conclusion, the Circuit Court of Appeals held that the use to which the Government had put the intercepted communications in the case at bar did not violate Section 605. The Court held, despite the provisions of the fourth subdivision of Section 605, and despite the decision of this Court in *Nardone* v. *U. S.*, 308 U. S. 338, that Section 605 merely forbids a divulgence of an intercepted message upon the trial of the action, and

* We may point out that the Record does not wholly sustain the assumption of the Court below that, as a matter of fact, these petitioners were not parties to any of the intercepted messages. At the preliminary hearing the Government stipulated that 24 of the intercepted communications "have to do with" petitioner Goldstein, 35 with petitioner Rubin, and 2 with petitioner Elentuch. (R. 148). The prosecutor further stipulated that the foregoing tabulation included messages in which these petitioners' names may have been mentioned, "or" to which they were parties. (R. 610). Furthermore, it is the fact, although it is nowhere so stated in the Record, that petitioner Goldstein was a party to at least 8 of the intercepted messages and petitioner Rubin to 15.

The question of *locus standi* was not raised or discussed in the District Court, or even raised by the Government on the appeal. Petitioners do not base this application for a writ of *certiorari*, however, upon any claim of incorrectness in the basic fact upon which the decision of the Court below was predicated. Petitioners' application is based upon the unsoundness of that decision as a matter of law, and for that purpose they are willing to assume the facts to be as stated in the Court's opinion.

that the statute does not prevent any use by the Government of an intercepted message which has been divulged prior to the trial at least as against defendants who are not parties to the intercepted message. (Opinion, p. 1246).

II.

The rulings of the District Court with respect to the conduct and scope of the preliminary hearing unduly hampered petitioners' efforts to develop proof in support of their contention that the Government's evidence had been obtained, directly or indirectly, as a result of the use of illegally intercepted telephone messages. The District Court ruled that petitioners would not be permitted to cross examine witnesses who had testified that the Government's case had an origin independent of wiretapping. (R. 126, 153, 175, 180). An attempt to limit witnesses to stating evidence rather than their own conclusions was prevented by the Court. (R. 257, 280). The unrestrained expression of witnesses' opinion was permitted. (R. 256, 301, 308, 626, 675, 753 *et seq.*, 757-60).

The Court refused to permit petitioners to inspect numerous documents to ascertain how thoroughly interwoven illegal strands of evidence were with legal strands of evidence (Prelim. Hearing Exhibits, Shea's Report, not marked [R. 292-3] and Exhibits BB [R. 323], DD [R. 340], EE [R. 370], 1, 5, 6). The Court examined these documents but would not permit petitioners to see them. The full import of the material which they contained could only be decided by petitioners, particularly since independent reading by a Judge unfamiliar with the ramifications of the case could be of no assistance in determining whether any particular evidence had been derived from the tainted source. Only where wiretapping was expressly mentioned or where the Government gave its consent were petitioners permitted to examine even portions of documents. (See R. 131-2, 136, 137-8, cf. 150, 291, 309, 340).

This was particularly prejudicial in view of the fact that the petitioners were trying to show that wire tapping had entered into the preparation of the case even prior to the time it had been brought to the United States Attorney's office, after which time wiretapping was admittedly conducted with the Government's knowledge and assistance.

The insurance companies had obtained an informer named Kipnis, who is alleged to have given a story which obviously "would not be believed unless thoroughly corroborated" (Opinion, p. 1237).

Wiretaps were used by the insurance companies to obtain that corroboration. After the matter was brought to the United States Attorney's office, wiretapping was employed under the Government's supervision, taps being placed on the offices of Garrow, Dr. Messman and the home and office of Joseph J. Weiss (R. 101-102, 148, 781).

Petitioners contended that the taps, in addition to being used to break down Messman and Garrow, had served the purpose of furnishing clues and leads to refresh the recollection of these witnesses and others and to obtain additional information. In fact, it was claimed that the illegal taint attached to every bit of the Government's evidence.

The Circuit Court of Appeals held (Opinion, p. 1248) that despite the fact that the District Court "did indeed express himself once or twice in a way that seemed to restrict the examination unduly" nevertheless he did not so conduct the hearings as to violate the general principles announced by this Court in *Nardone* v. *U. S.*, 308 U. S. 338 (1939). Moreover, the Court held that any question as to the conduct of the hearing was immaterial, in view of the fact that the petitioners had no standing to complain of the use to which the intercepted messages were put.

III.

The Court's charge to the jury was highly prejudicial to the rights of these petitioners. The Court summarized those portions of the Government's evidence most damaging to petitioners Schwartz and Goldstein without referring to the contradictory evidence which they had offered in their own behalf. The Court used the technique of asking rhetorical questions. Of these the Circuit Court of Appeals said (Opinion, p. 1247): "These he did indeed couch in such a way as to make fairly apparent what answers he would himself have given to them; and it must be owned that the answers were damaging."

Thus, for example, the Court first painted the witnesses, Messman and Garrow as "crooks" and elaborated upon their "low moral character" (R. 5132). He pointed out that both Drs. Goldstein and Schwartz had dealt with Messman and Garrow over a period of three years, Messman and Garrow having brought various patients to them in their capacities as consultants. The Court then said (R. 5145):

> "I suggest that you turn your minds back to Messman and Garrow as you observed them. I think that together they were on the witness stand a matter of about three weeks. I think you had an ample opportunity for appraising them. What do you say as to the impression that they would be likely to create on consultants? Would consultants be able to observe, during a period of dealing with those men, what their essential qualities were? Is it likely that the defendants Goldstein and Schwartz were sufficiently equipped with the powers of perception to fairly well appraise Garrow and Messman?"

The Court made no mention of petitioners' denial of knowledge of the true characters of Messman and Garrow.

Furthermore, the Court did not point out that these petitioners, if their testimony were true, had not had the jury's opportunity to appraise Garrow and Messman in the light in which they appeared at the trial. Nor did the Court point out that the testimony of Messman and Garrow should be weighed in the light of their admittedly bad character as against the testimony of these petitioners who concededly bore good reputations. The Court in effect suggested to the jury that petitioners were guilty because they had done business with persons who, years later, admitted their guilt on the witness stand. (R. 5144).

The Court proceeded to call attention to specific portions of the Government's evidence, which necessarily gave that evidence an excessive importance to the jury. With reference to petitioner Goldstein the Court stated that the testimony of one of the Government's witnesses, Fradkin, was "worthy of the attention of the jury". (R. 5149). The Court emphasized that petitioner Goldstein had been unable to produce his records in the Fradkin case. The Court failed, however, to mention petitioner's explanation of that fact, nor did he remind the jury that the Government in fact possessed and introduced in evidence a copy of the record. (R. 4000).

Similarly the Court called the attention of the jury to a certain letter written by petitioner Goldstein to petitioner Rubin. (Government's Exhibit 232; R. 5152). The Court failed to present the version of petitioners Goldstein and Rubin as to this transaction. (R. 4177, 4207, 4355).

With reference to petitioner Schwartz the Court emphasized a portion of the Government's evidence relating to one Kaplan, a patient whom Schwartz had treated. (R. 5146). He pointed out that there was evidence that certain sputum had been fraudulently substituted in Kaplan's case. He failed to mention Schwartz's testimony as to his actions when this matter had been brought to his attention. (R. 3696).

The Court also stressed certain evidence relating to an electrocardiogram taken of a patient of Schwartz which bore the notation "This suggests digitalis". The Court asked a series of questions which clearly indicated that in his opinion the existence of this notation should have indicated to Schwartz that the patient's claim was fraudulent. He failed to mention the fact that defendants' evidence showed that prior to the return of the indictments in this case very little was known as to the effect of digitalis upon electrocardiograms. (R. 4129-33).

The Circuit Court of Appeals held that this charge did not constitute prejudicial error, on the ground that the District Court gave the jury only "oblique intimations" (Opinion, p. 1247) as to his views of the defendants' guilt, rather than direct statements thereof, and that consequently the case was to be distinguished from *Murdock* v. *U. S.*, 290 U. S. 389 (1933), and *Quercia* v. *U. S.*, 289 U. S. 466 (1933).

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on June 18, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, U. S. C. Title 28, Section 347.

Questions Presented.

I.

Did the Court below err in holding that petitioners who were not parties to telephone communications intercepted and divulged in violation of Section 605 of the Federal Communications Act have no standing to complain of the violation of that statute?

II.

Did the Court below err in holding that Section 605 of the Federal Communications Act does not prohibit the use upon the trial of evidence obtained by unlawful interception and divulgence in advance of trial of telephone communications as against defendants who were not parties to the communications?

III.

Did the Court below err in holding that the District Court did not unduly limit the scope and conduct of the preliminary hearing held in accordance with the rule announced by this Court in *Nardone* v. *U. S.*, 308 U. S. 338 (1939).

IV.

Did the Court below err in holding that the charge of the District Court was not prejudicial to the rights of these petitioners?

Statutes Involved.

Section 605 of the Federal Communications Act (Ch. 652, 48 Stat. 1064, 1103; U. S. C. Title 47, Section 605) provides as follows:

"§605. Unauthorized publication or use of communications.

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance,

purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; *and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person;* and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; *and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto*: Provided, That this section shall not apply to the receiving, divulging, publishing or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. (June 19, 1934 c. 652, §605, 48 Stat. 1103.)" (Italics supplied.)

Reasons for the Allowance of the Writ.

1. The decision of the Court below holding that because petitioners were not parties to the telephone communications intercepted and divulged in violation of Section 605 of the Federal Communications Act, they have no standing to complain of that violation, is a decision upon an important question of federal law which has not been, but should be, settled by this Court.

2. The decision of the Court below upon the aforesaid question is a decision upon a federal question in a way probably in conflict with applicable decisions of this Court. *Nardone* v. *U. S.*, 302 U. S. 379 (1937); *Nardone* v. *U. S.*, 308 U. S. 338 (1939); *Weiss* v. *U. S.*, 308 U. S. 321 (1939).

In *Weiss* v. *U. S.*, 308 U. S. 321 (1939) this Court reversed the convictions of all the appellants, although it appeared from the record, and from the Government's brief (pp. 40-41), that appellant Goldstein was not a party to any of the intercepted telephone communications which this Court held inadmissible. This point was not specifically mentioned in the opinion of this Court.

3. The decision of the Court below, holding that Section 605 of the Federal Communications Act does not prohibit the use upon the trial of evidence obtained by unlawful interception and divulgence in advance of trial of telephone communications, as against defendants who were not parties to the communications is a decision upon a federal question in a way probably in conflict with applicable decisions of this Court. *Nardone* v. *U. S.*, 308 U. S. 338 (1939); *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920).

4. The decision of the Court below, holding that the District Court did not unduly limit the scope and conduct of the preliminary hearing held in accordance with the rule announced by this Court in *Nardone* v. *U. S.*, 308 U. S. 338, (1939), is a decision upon an important question of federal law which has not been, but should be, settled by this Court.

5. The decision of the Court below, holding that the Judge's charge did not prejudice the rights of the petitioners, so far sanctions a departure by the lower Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioners pray that a writ of *certiorari* issue to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Circuit Court of Appeals be reversed; and that the petitioners be granted such other and further relief as may seem proper.

Dated, New York, N. Y., July 10, 1941.

DR. MAXIMILIAN GOLDSTEIN

By THEODORE KIENDL,
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IN THE

Supreme Court of the United States

OCTOBER TERM—1941

DR. MAXIMILIAN GOLDSTEIN, DR. BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit has not yet been officially reported. It is annexed to the certified transcript of the record heretofore filed herein, and is reprinted as an Appendix hereto.

No opinion was rendered by the United States District Court for the Southern District of New York.

Jurisdiction.

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on June 18, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended, U. S. C. Title 28, Section 347.

Statement of the Case.

A summary statement of the case is set forth in the petition. A summary of the argument is set forth in the index.

Specification of Assigned Errors to be Urged.

It is intended to urge the following errors:

1. It was error to hold that because petitioners were not parties to the telephone communications intercepted and divulged in violation of Section 605 of the Federal Communications Act, they have no standing to complain of that violation.

2. It was error to hold that Section 605 of the Federal Communications Act does not prohibit the use upon the trial of evidence obtained by unlawful interception and divulgence in advance of trial of telephone communications, as against defendants who were not parties to the communications.

3. It was error to hold that the District Court did not unduly limit the scope and conduct of the preliminary hearing held, in accordance with the rule announced by this Court in *Nardone* v. *U. S.*, 308 U. S. 338 (1939).

4. It was error to hold that the charge of the District Court was not prejudicial to the rights of these petitioners.

Argument.

I.

It was error to hold that because petitioners were not parties to the telephone communications intercepted and divulged in violation of Section 605 of the Federal Communications Act, they have no standing to complain of that violation.

As we have previously stated, the decision of this Court in *Weiss* v. *U. S.*, 308 U. S. 321 (1939) is, in reality, a holding on this point in favor of the petitioners, although the question was not discussed in the Court's opinion. Inasmuch

as the record in that case revealed that petitioner Goldstein was not a party to any of the telephone communications there involved, and inasmuch as this fact was pointed out in the Government's brief (pp. 40-41), this Court necessarily held, in reversing the conviction of petitioner Goldstein, that he had a right to complain of the admission of that evidence. The Court below, of course, appreciated that this question was presented in the *Weiss* case. Nevertheless, it held that the question was not there decided. The Court below said (Opinion, p. 1243):

> "It is indeed always a matter of the greatest delicacy to say that the decision of a superior court is not to be taken as authoritative upon a point not discussed; yet there are occasions when, unless we do so, we shut our eyes to the fact that in every probability it was not decided at all. It seems to us that this is such an occasion, and that the matter is open."

We believe that the Court below should not thus have dismissed the *Weiss* case from its consideration and that it should have followed the actual holding of that case, despite the absence of any specific discussion of the point by this Court. However, even if the contrary be assumed, and if the question be deemed an open one, we believe that the Court below likewise fell into error in deciding that question as it did. We submit that a proper construction of Section 605 requires the conclusion that these petitioners have the right to complain of its violation.*

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* It may be noted that the decision of the Court below is in conflict with another decision of the same Circuit Court of Appeals on the same question. In *U. S. v. Bernava*, 95 Fed. (2nd) 310 (C. C. A. 2nd 1938), the conviction of a defendant who was not a party to an illegally intercepted telephone communication was reversed. A contrary result was reached in *United States v. Seeman*, 115 Fed. (2nd) 371 (C. C. A. 2nd 1940). With the exception of Judge A. N. Hand, the judges who sat in the *Bernava* and *Seeman* cases were different.

The Circuit Court of Appeals based its decision upon a supposed analogy with the rule that has obtained under the Fourth Amendment, that only the owner or possessor of property taken by an illegal search or seizure may seek its return, or may object to its introduction in evidence at a criminal trial. This Court has never expressly passed upon that principle, as the Court below recognized (Opinion, p. 1243), although it has received the approval of various Circuit Courts of Appeal. (See *Connolly* v. *Medalie*, 58 Fed. (2d) 629). In any event we believe that the rule has no application here.

In the first place, it is obvious that the rule is not directly applicable, for the tapping of telephone wires is not a violation of the Fourth Amendment. This Court so held in *Olmstead* v. *U. S.*, 277 U. S. 438 (1928), and when, in *Weiss* v. *U. S.*, *supra*, the appellants asked the Court to reconsider that decision, it found it unnecessary to do so.*

Consequently, the doctrine of the Fourth Amendment cases can be considered here only on the theory that the Fourth Amendment and Section 605 of the Communications Act are so analogous that the limitations of the former must be deemed equally the limitations of the latter. We believe that the fallacy of such a theory can be demonstrated.

That Section 605 is broader in its terms than the Fourth Amendment is apparent at first glance. Thus, the Fourth

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* It may be noted that the opinion of the Court below, in discussing the Fourth Amendment, does not once mention the *Olmstead* case. Yet, in *Nardone* v. *U. S.*, 106 Fed. (2nd) 41 (C. C. A. 2nd 1939) [Rev. 308 U. S. 338 (1939)], in which the Circuit Court of Appeals held that Section 605 does not prohibit the employment of wire tapping as a means of obtaining clues and leads to other evidence, the Court relied on the *Olmstead* decision to distinguish the case at hand from the contrary rule prevailing under the Fourth Amendment. Thus, it would appear that the Circuit Court of Appeals asserts a similarity between Sections 605 and the Fourth Amendment, when to do so would result in a restricted interpretation of Section 605, and denies that similarity when its existence would result in a liberal interpretation of the section.

Amendment forbids only "unreasonable" searches and seizures. The Communications Act does not permit "reasonable" wire tapping. Interception of telephone communications cannot be sanctioned by a warrant.

There is another respect, more important for present purposes, in which the scope of Section 605 exceeds that of the Fourth Amendment. The amendment forbids merely the acquisition of evidence by illegal search. It does not expressly forbid the use of that evidence once it has been acquired. The doctrine which prohibits that use has its origin, not in the language of the amendment itself, but in the judicial decisions which have interpreted it. This Court has held that the safeguards of the Fourth Amendment can be made effective only by permitting the owner of property which has been illegally seized to compel its return, and by forbidding the Government to use it, directly or indirectly, against him. *Weeks* v. *U. S.*, 232 U. S. 383 (1914). The penalty for violation of the amendment could have been made even stronger by forbidding the Government to use evidence so acquired against anyone, whether the owner or not. The lower federal courts have declined to extend the doctrine that far. The point of importance is that they were free to extend it or not as they saw fit.

Section 605, however, permits no such latitude of interpretation. That statute in terms prohibits, not only the acquisition of evidence by interception, but also its subsequent divulgence. Congress has said that "no person" shall divulge the contents of the intercepted communication to "any person". This Court has interpreted that provision to mean that the message shall not be divulged either in court (*Nardone* v. *U. S.*, 302 U. S. 379 (1937); *Weiss* v. *U. S.*, 308 U. S. 321 (1939)), or out of court in advance of trial (*Nardone* v. *U. S.*, 308 U. S. 338 (1939)). There is no room to interpret it as meaning that intercepted messages

shall not be divulged on some occasions but may be divulged on others, or that divulgence as against parties to the communications is forbidden, but as against those who are not parties is permitted. The statute creates no such distinction. It prohibits any divulgence whatsoever.

The purpose of Section 605, as this Court has held (*Nardone* v. *U. S.*, 302 U. S. 379, 383 (1937)) is to forbid the employment by the Government of a particular method of obtaining evidence which is deemed "inconsistent with ethical standards and destructive of personal liberty". That purpose can be implemented only by enforcing the statute in accordance with its unequivocal terms. The construction adopted by the Court below, far from enforcing the will of Congress, in fact nullifies it. If that decision stands, federal prosecutors may continue to "tap" telephone wires, happy in the knowledge that there will surely be some defendant who did not happen to participate in the intercepted conversations, against whom the records of those conversations and all other evidence obtained through their use may be introduced. Indeed, where there are numerous defendants, as is usually the case in indictments of this character, it would be possible to introduce records of a conversation with defendant A as evidence against defendant B, and thereafter to introduce, as against defendant A a conversation with defendant B. Thus, all the communications would be most thoroughly divulged to the jury, and yet the legislative prohibition of divulgence would not be violated.

Such a result seems absurd. Yet it would necessarily follow from the construction given to the statute by the Court below. The Court recognized that "in form the language [of the statute] is indeed imperative". (Opinion, p. 1244). We submit that the Court should have given effect to that imperative language rather than qualify it by reading into the statute a limitation which is not there expressed.

II.

It was error to hold that Section 605 of the Federal Communications Act does not prohibit the use upon the trial of evidence obtained by unlawful interception and divulgence in advance of trial of telephone conversations as against defendants who were not parties to the communications.

In *Nardone* v. *U. S.*, 308 U. S. 338 (1939) this Court held squarely that Section 605 not only prohibits the divulgence of intercepted communications by introducing them in evidence at the trial, but also prohibits a divulgence in advance of trial and use in preparation for the trial of messages so divulged. The Government may not reap the benefit of its violation of the statute by using the intercepted messages as a means of obtaining other evidence. Consequently, the Court held that the District Court must permit the defendants an opportunity to examine the prosecution as to the uses to which it has put the information derived from the intercepted communications. It was in accordance with this decision that the preliminary hearing was held in the case at bar.

Despite that decision the Court below appears to have held that Section 605 is not violated by a use of messages divulged prior to the trial. The Court said (Opinion, p. 1246):

> "We of course do not forget that it is precisely the use of evidence obtained by such divulgence that *Nardone* v. *United States, supra,* (308 U. S. 338) condemned, but the distinction between divulgence of the message by the very act of introducing it, and introducing evidence acquired by past divulgence, is nevertheless critical."

We confess to an inability to understand that distinction. This ground of the decision of the Court below seems to us to be irreconcilable with *Nardone* v. *U. S., supra.*

Moreover, the Court below appears to have overlooked the fact that Section 605 of the Federal Communications Act in its fourth subdivision states:

> "*No person* having received such intercepted communication or having become acquainted with the contents * * * shall divulge or publish * * * or *use the same* or any information contained therein *for his own benefit* or for the benefit of another not entitled thereto."

The Circuit Court of Appeals nevertheless stated that the Federal Communications Act bars only divulgence and not use. Petitioners contend that the Section is clear in its prohibition and its policy has been interpreted by this Court in the second *Nardone* decision as comprehending use as well as divulgence.

Finally, it may be observed that the Circuit Court of Appeals, in reaching its conclusion apparently again relied upon the supposed rule under the Fourth Amendment, stating that (Opinion, p. 1246) "it would be a curious result, if a violation of the section were more sweepingly condemned than a violation of the Constitution." But even under the Fourth Amendment it is well settled that evidence obtained in violation of that amendment not only may not be used at the trial, but may not be used at all. *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385 (1920).

If this passage of the opinion of the Court below actually means what it appears to mean, then the Circuit Court of Appeals has thrown open to the prosecution an invitation to tap telephone wires indiscriminately, despite the prohibition of Section 605. If the Government may make full use of the forbidden evidence in the preparation of its case, provided only that it does not introduce the intercepted messages themselves at the trial, the intent of Congress, as this Court has heretofore interpreted it, will indeed be thwarted.

III.

The Court below erred in holding that the District Court did not unduly limit the scope and conduct of the preliminary hearing.

This is the first case which has arisen since the decision in *Nardone* v. *U. S.*, 308 U. S. 338 (1939) which presents the question of the application of the rule which this Court there laid down. In view of that fact the question is clearly of sufficient importance to warrant decision by this Court.

It is true that under the *Nardone* decision wide discretion is vested in the District Court. There must nevertheless be some limit to that discretion. We believe that in the case at bar that limit was exceeded.

The Court did not permit defendants to cross examine the witnesses who testified at the preliminary hearing, all of whom were obviously hostile. Nor did the Court permit defendants to mark in evidence the various documents produced by the Government at the hearing. Moreover, the Court did not permit defendants to examine those documents. The Court examined them and permitted defendants to see only those portions which specifically referred to intercepted telephone communications. In view of the Court's unfamiliarity with the details of the case, it was manifestly impossible for him to determine whether or not a given document contained evidence which had been obtained indirectly through the use of the forbidden "wiretaps". Thus defendants were prevented from developing evidence as to the actual extent to which the intercepted communications had been used by the Government.

The Court below conceded that the District Judge "did indeed express himself once or twice in a way that seemed to restrict the examination unduly," (Opinion, p. 1249) but held nevertheless "we cannot see that he held them on too

tight a rein." Furthermore, the Court below dismissed the point as immaterial in any event in view of its decision that these petitioners had no standing to complain of the use made by the Government of the intercepted communications.

It would seem that the point is by no means immaterial. For if the defendants' right to complain is indeed an issue, and if it is necessary to determine whether or not they were parties to the intercepted communications, then there is all the more reason for permitting them a thorough examination into the facts. The matter is one peculiarly within the knowledge of the Government. Unless defendants are allowed to cross examine the representatives of the Government, and to peruse the documentary evidence which the Government has assembled, the entire proceeding will be rendered futile. Nor is it a sufficient answer to say that such a procedure will result in the disclosure of the Government's case in advance of trial. A certain measure of disclosure is inevitable, and where it is a question of choosing between the rights of the defendants, guaranteed them by Section 605, and the interests of the Government, the former should prevail, since the choice has been made necessary in the first instance by the wrong of the Government in violating the statute. In the case at bar, however, the District Court gave the Government the benefit of every doubt.

IV.

The Court below erred in holding that the charge of the District Court was not prejudicial to the rights of these petitioners.

In order to illustrate thoroughly the unfairness of the Judge's charge, a detailed discussion of the principal items of evidence introduced on both sides of the case would be required. Obviously petitioners cannot embark on such a discussion here. They feel, however, that even in the ab-

sence of such a summary of the evidence, the mere reading of the charge will disclose that the Court consistently emphasized only that evidence which was favorable to the contentions of the Government. Moreover, no study of the record is necessary to an appreciation of the damaging effect of the technique adopted by the Court. Throughout his charge he asked a series of rhetorical questions, which were phrased in such a way as to admit of only one answer, an answer which was invariably injurious to the petitioners. The Court might as well have told the jury in so many words that he believed each of the petitioners to be guilty. Although the Court's method of conveying this thought was somewhat more subtle than such a blunt statement would have been, it was no less effective.

It appears therefore that in substance the charge of the defendant was analogous to that in *Quercia* v. *U. S.*, 289 U. S. 466 (1933). This Court there held that a charge in a criminal case should not be "one-sided." The charge in this case certainly violated that requirement. The Court below nevertheless sustained the charge on the ground that " 'fairness' does not mean neutrality" (Opinion, p. 1248). We submit that fairness should mean exactly that, and that a charge which presents only one side of the controversy must necessarily be "unfair".

V.

CONCLUSION.

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a writ of *certiorari* should be granted.

Dated, New York, July 10, 1941.

Respectfully submitted,

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APPENDIX

Opinion Below

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 263—October Term, 1940.

(Argued March 31, 1941 Decided June 2, 1941.)

UNITED STATES,

Appellee,

v.

MAXIMILIAN GOLDSTEIN, BENJAMIN SCHWARTZ, HERMAN RUBIN and IRVING ELENTUCH,

Appellants.

Appeals from judgments of conviction of the District Court for the Southern District of New York, under an indictment for using the mails to defraud and for a conspiracy to do so.

Before:

L. HAND, SWAN and AUGUSTUS N. HAND,

Circuit Judges.

THEODORE KIENDL for Goldstein;

LESTER R. BACHNER for Schwartz;

BENJAMIN KRONENBERG for Elentuch;

SIDNEY J. LOEB for Rubin;

MAXWELL S. MCKNIGHT for the appellee.

L. HAND, *C. J.*:

"These are appeals from convictions for a scheme to defraud—together with a conspiracy to commit the same crime. The scheme was the same as that which was before us in *United States* v. *Weiss*, 103 Fed. (2) 348; but the convictions which we then affirmed were under another indictment and all of the accused except Goldstein were different from those now at bar. The Supreme Court reversed these convictions (*Weiss* v. *United States*, 308 U. S. 321) because of the admission of certain "wire taps," and when the case went back for a new trial, a preliminary hearing was had, following the practice prescribed in *Nardone* v. *United States*, 308 U. S. 338. Before any decision had been made upon the evidence taken at this hearing, J. J. Weiss, one of the accused, pleaded guilty; thereupon the prosecution proceeded under the present indictment, which was then pending, and abandoned the "Weiss" indictment. The evidence already taken was by agreement admitted in a similar preliminary hearing begun under this indictment, at the end of which the judge decided that the prosecution should be allowed to call as witnesses two of the prime movers in the scheme, Messman and Garrow, overruling the objection that they had been induced to turn state's evidence by means of records obtained by "tapping" their wires. One of the seven accused pleaded guilty during the trial, but the other six went through to verdict, and the appellants are four of these. The important points raised are (1) that the testimony of Messman and Garrow was procured by "taps," (2) that it did not also appear that the "taps" had not served as clues leading to other evidence which had been introduced, (3) that the judge's charge was not impartial, and (4) that the evidence did not support the verdict.

In order to decide how far the use of the "taps" should have prevented the calling of Messman and Garrow, we

must go back to the original discovery of the frauds. Sometime before August, 1936, a number of large insurance companies, suspecting that they were being victimized, retained two firms of lawyers to run down the culprits. One Bernstein was a member of one of these firms, and in that month a man named Kipnis came to him and made an oral confession which laid bare the outlines of the whole scheme. Kipnis had been one of the insured who had fraudulently collected upon a disability policy, and he had helped a number of others to commit similar frauds. The plan involved the insured's taking digitalis or some similar drug which would make his heart's action simulate disease, and this, together with a proper paraphernalia of cardiograms, hospital records and declarations of symptoms, was enough to evade detection by the insurers. To the success of such a scheme a confederation of lawyers, doctors—including heart specialists—and of course the insured themselves, was necessary. Kipnis inculpated Weiss and Garrow, lawyers, Messman and Goldstein, doctors, and a great many others. His story to Bernstein, as Bernstein gave it, if believed, made a complete case, but obviously he would not be believed unless thoroughly corroborated; and Bernstein set out to procure the necessary corroboration. He instructed Kipnis to keep up a front of continued participation in the scheme and he installed in Kipnis's offices a dictaphone which would record talks with visitors. Besides this, he got records of telephone talks between Kipnis and his confederates, by means of an extension receiver at which a stenographer was placed; no machine was interposed in the circuit during this period. Matters went along in this way through August and September, Kipnis meanwhile disclosing to Bernstein numerous fabricated "case histories" of fraudulent claimants. On October 8, 1936, Kipnis made a detailed and lengthy written confession which implicated Weiss, Garrow, Messman, Goldstein and a great many others, and which,

along with his other material, Bernstein shortly thereafter presented to Hardy, the district attorney, who on November 27th, called in a post-office inspector, Shea, to work up the case. On December 6, Shea, without any independent investigation of his own, turned in a report to Hardy in which he declared that there was ground for the indictment of 75 or more persons. Towards the end of January, 1937, Hardy had a conference with Bernstein and the other insurance lawyers at which they decided to begin the regular "tapping" of the wires of the principals in the scheme by introducing recording machines into the circuits; and this went on with some interruptions from that time until the arrest of Messman and Garrow on May 18, 1937, and even later. By these means nearly a thousand records were procured of talks between the confederates, in none of which, however, did any of the appellants at bar take part. The prosecution introduced none of these records in evidence, and they could therefore have contributed to the convictions only in two ways: they might have contained clues leading to the discovery of some of the evidence actually introduced; and they might have served in whole or in part to induce Messman and Garrow to turn state's evidence and become the chief witnesses at the trial. The prosecution denied that they were useful as clues, or that they had helped in any way except as confirmation of information which it already had. The record contains nothing to contradict the testimony of those gentlemen who had prepared the case and who swore that Kipnis's confession, the cardiograms, the insurance files and the hospital records were the sources of all their information. We should not therefore have been justified in sustaining a finding that the "taps" had served as clues, even if one had been made and if the prosecution had the burden of proof upon the issue.

There remains the question whether the "taps" served to break down either Messman or Garrow and turn them into

informers. The testimony of each was so vital to the case that the convictions cannot survive if the prosecution should not have been permitted to call either. Both these men were arrested on May 18, 1937, and Messman was taken at once to the district attorney's office where an assistant examined him. The assistant told him that his telephone and "all these lawyers' telephones" had been "watched"; that he might hear his own voice if he chose; that the prosecution would like to know whether he would tell everything or "play ball" with the accused; and that it knew what was going on and was not "stabbing in the dark." As he did not then break down he was put into the same cell with one, Nelson, another of the confederates, who told him and still another, Gross, that the prosecution had gathered together "an awful lot of evidence" including telephone records in which he, Nelson, had heard a talk of his own with Weiss. There was "too much dirt against us. The government has got everything." After hearing this from Nelson, Messman was on the same day taken back to the assistant's room where he confessed. On the preliminary hearing he denied that the telephone record had had anything to do with his breakdown; he said that he had seen the net gathering about him for some months before his arrest, had decided that his only chance was to plead guilty, turn informer, make what terms he could with the prosecution, and, as to his sentence, to rely upon the help he could give to convict the others. He confessed that he was abandoned in morals, ready to do anything that would serve his turn, and showed himself utterly untrustworthy. It is indeed curious, if he had made up his mind to change front before he was arrested, that he failed to confess when he was first before the district attorney and waited until after Nelson had dilated upon the amount of evidence which had been accumulated against him. One would have expected that on his own story his arrest would have been enough to touch

off his confession. However, if the judge had affirmatively found that the "taps" contributed nothing to this result, we should not have disturbed the finding; it is not impossible that although from the start he meant to confess, he might not have seized the first moment to do so. The difficulty is that it does not appear that the judge meant to find more than that the accused failed to prove that the "taps" had contributed to the breakdown. For this reason the issue depends upon which side had the burden of proof at the hearing.

The case for the accused is considerably weaker as to Garrow. He too was arrested on May 18, 1937, but he did not confess until nearly two years later. It is true that he did so only a few days after we had held in *United States* v. *Weiss*, 103 Fed. (2) 348, that it was proper to allow the introduction of the "taps," and the argument is not without plausibility that this sequence was causal. Still, he was not subjected to the same pressure as Messman, and like Messman he declared that the "taps" had not influenced him at all, though his word was, if possible, even less reliable. Again, we should not have disturbed an express finding, had there been one, and the issue, like that as to Messman, depends upon the burden of proof. Upon that question we have nothing to guide us but *Nardone* v. *United States, supra* (308 U. S. 338) and that did not actually decide the question. It is true that Mr. Justice Frankfurter did say (p. 341) that the accused had the burden of proving that the prosecution "tapped" the wires, and that if he did, the judge must give him a fair opportunity to show how far the "taps" had infiltrated into the case. He added, however, that after this had been done it would leave "ample opportunity to the Government to convince the trial court that its proof had an independent origin." That language cannot indeed serve as a ruling that the prosecution has the burden to show how far its proof has "an independent

origin," but it is consonant with that position, and to some extent suggests it. In any event it appears to us that this should be the rule in analogy to the well settled doctrine in civil cases that a wrongdoer who has mingled the consequences of lawful and unlawful conduct, has the burden of disentangling them and must bear the prejudice of his failure to do so; that is, that it is unfair to throw upon the innocent party the duty of unravelling the skein which the guilty party has snarled. To impose the duty upon the prosecution is particularly appropriate here, for it necessarily has full knowledge of just how its case has been prepared; given a *prima facie* case against it, i. e., "taps" and some use of them, it should do the rest. It is true that the tendency has of late been to mollify the extreme of this requirement, substituting the best honest guess for a quantitative allocation when that is obviously impossible, so that the victim shall not get what cannot possibly be his. *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U. S. 390. But there has been no disposition to relax that feature of the doctrine which resolves all possible doubts against the wrongdoer. We content ourselves with citing some of those decisions which expressly state the reasoning. *The Idaho*, 93 U. S. 575, 585, 586; *Schnell* v. *The Vallescura*, 293 U. S. 296, 306, 307; *Brainard* v. *Cohn*, 8 Fed. (2) 13, 15 (C. C. A. 9); *United States* v. *Federal Mail Order Corp.*, 47 Fed. (2) 164, 165 (C. C. A. 2); *Samson* v. *Rose*, 65 N. Y. 411, 421; *Wellock* v. *Cowan*, 246 Mich. 45. We hold therefore that, after the accused had proved that the "taps" had been made and had to some extent been used to break down Messman and to a less degree Garrow, the burden fell upon the prosecution to satisfy the district judge that they had no part, or no substantial part, in that result. This being true, and the condition of the findings and the evidence being what we have described above, we hold that, as the record stands, the judge should have forbidden the prosecution to

call Messman, and probably Garrow as well, though as to him we need make no finding. In so deciding we assume that the accused were entitled to invoke the protection of §605, and that assumption we shall now consider.

The authorities on that question are very few. In *United States* v. *Seeman*, 115 Fed. (2) 371, 374, we expressly held that §605 merely conferred a privilege personal to the "sender," though we had without discussion decided the opposite once before. *United States* v. *Bernava*, 95 Fed. (2) 310. Our own decisions are not, however important if the Supreme Court has ruled otherwise; and the question is how far the reversal, even as to Goldstein, in *Weiss* v. *United States*, *supra* (308 U. S. 321), must be taken as a holding the opposite of our ruling in *United States* v. *Seeman*, *supra*. Although, as we have said, Goldstein's wires had never been "tapped," Weiss's had been repeatedly; and there were three records of talks in which Gross had had a part and three in which Krupp had. As to Weiss it therefore was clearly necessary to decide the chief point which the court discussed; i. e. whether the statute applied to intrastate messages. As to him it was necessary to discuss the second point also—the validity of Messman's consent. All this was likewise true of the records of the talks with Gross and Krupp. As to Goldstein alone did the decisions of these questions therefore become immaterial, assuming that §605 is limited to a personal privilege of the "sender." This made it very natural for a court to disregard that point even though, as was the case, the prosecution raised it in its brief. Strictly it would indeed have been still possible to affirm Goldstein's conviction and reverse the others', but the result would have been extremely harsh. It would have presupposed that a fair trial of the others could have been had, though the forbidden records were actually introduced in evidence provided that the jury had been admonished to use them only against Goldstein. Such an admonition

would have been practically valueless in a case like this, and the court might well have refused to affirm Goldstein's conviction when, if the trial had been fairly conducted throughout, the records would not have gone into evidence at all. It is indeed always a matter of the greatest delicacy to say that the decision of a superior court is not to be taken as authoritative upon a point not discussed; yet there are occasions when unless we do so, we shut our eyes to the fact that in every probability it was not decided at all. It seems to us that this is such an occasion, and that the matter is open.

Our reasons for thinking that if it is open, the convictions may stand are as follows. It is well settled that, although the victim of a search, unlawful under the Fourth Amendment, has a privilege to exclude any evidence against him procured in its course, the privilege is personal to him, and that no one else can avail himself of the violation, however scandalous that may have been. In *Connolly* v. *Medalie*, 58 Fed. (2) 629, we so decided and collected the cases up to that time which were very numerous and unanimous; and there has been no divergence since that time. Although the Supreme Court has never expressly passed upon that question, it has dealt with the privilege against self crimination under the Fifth Amendment in the same way. *Hale* v. *Henkel*, 201 U. S. 43, 69, 70. It is true that these privileges are considered as in part sanctions against the violation of the Constitution—being, in the case of searches, additional to the criminal sanctions imposed by statute (§§53a, 630 and 631, Title 18) and it is also true that they could have been made still stronger by forbidding the use of the evidence against everyone. Immunity was not carried so far; it was thought enough if only the injured person is protected. This was in accord with the law of privileged communications generally, for the communication is not itself privileged, only its disclosure. An eavesdropper, or a se-

creted dictaphone, may record and repeat whatever is said, whether the communication be between attorney and client (*Rex* v. *Simons*, 6 C. & P. 540; *State* v. *Center*, 35 Vt. 378, 382, 386; *Hoy* v. *Morris*, 13 Gray 519), between spouses (*Commonwealth* v. *Wakelin*, 230 Mass. 567, 574; *Knight* v. *State*, 114 Ga. 48; *Commonwealth* v. *Eversen*, 123 Ky. 330) or between physician and patient (*Springer* v. *Byram*, 137 Ind. 15). Furthermore, if a witness who should claim the privilege fails to do so, his testimony is competent and its admission is not an error of which a third party may complain. Wigmore §2196. True, when the witness does claim the privilege and it is erroneously overruled, apparently a majority of courts make the error available to third parties, but there can be no doubt that Professor Wigmore is right in holding with the minority, unless the third party shares that interest which alone justifies suppression of the truth.

So far therefore as §605 conferred a personal privilege on the "sender," there can be no doubt, it seems to us, that he alone can invoke it. It plainly does confer such a privilege, for the "sender" may consent to the divulgence of the message after it has been unlawfully intercepted. (The discussion of the second point in *Weiss* v. *United States*, *supra* (308 U. S. 321) presupposed exactly that; and it necessarily follows from the "sender's" privilege to divulge messages which have not been intercepted at all.) The question thus comes down to whether, when the "sender" has not consented, a third party may vicariously invoke the prohibition for his own protection. In form the language is indeed imperative: "no person not being authorized by the sender shall intercept * * * and divulge or publish" the message; moreover §501 makes divulgence a crime. In this respect §605 is therefore unlike those statutes which punish an unlawful search, but which do not punish the use of the evidence procured. Yet, although there cannot for this reason be any question that only the consent of

the "sender" will condone the divulgence of an intercepted message, it does not follow that anyone else can complain of the wrong. Certainly "senders" alone are within the protected class (if it were not so, their consent would not excuse divulgence) and the purpose could not have been more than to protect the secrecy of their talks. For example, nobody but a "sender" could sue civilly for a violation of the section. *St. Louis & San Francisco R. R. Co.* v. *Conarty*, 238 U. S. 243; *Lang* v. *New York Central R. R. Co.*, 255 U. S. 455; *Gorris* v. *Scott*, L. R. 9 Ex. 125; *Boronkay* v. *Robinson & Carpenter*, 247 N. Y. 365; Restatement of Torts §286. Nor can it be urged as a distinction that that doctrine is limited to cases where a party seeks affirmative relief for a violation of the statute; for that is what the accused at bar are seeking. The proscribed evidence, taken by itself, is entirely competent, and could be produced but for its wrongful acquisition; the accused must persuade the court to forbid its use; they ask a remedy for a wrong done to them and they must have some standing to complain. They have no standing unless they can show an interest which will be invaded by the divulgence and which the law will recognize. They do indeed have an interest which is invaded, but it is not one that the law will recognize. It is nothing better than that evidence, which shows them to have committed a crime, shall be suppressed because they are deeply interested in not being punished for that crime. If they were defendants in an equity suit, they might succeed, for a defendant in equity need not be the victim of the wrong which disqualifies the plaintiff to seek an equitable remedy, provided it is closely enough interwoven with the legal transaction involved in the suit. But, so far as we know, there is no doctrine that a criminal prosecution can be defeated by showing that the prosecutors must commit a wrong—civil or criminal—to prove their case. Such considerations are relevant indeed between them and their

superiors, but these the accused does not vicariously represent. Indeed, in this particular application of such a doctrine if it existed, the curious result would be that the event would turn upon which side succeeded in securing the favor of the "sender"—a person who might very well have no interest of his own in the divulgence of the message.

Finally, whatever may be thought of the foregoing, it so chances that in the case at bar the convictions can stand even if the section does so peremptorily forbid divulgence of a message that anyone can take advantage of its violation. This is so because the section prohibits only the divulging of the message, not its use after it has been divulged, and in the case at bar no message was divulged upon the trial. The prosecution had indeed committed a crime earlier, and by hypothesis the evidence it introduced was the fruit of that crime; but that was all in the past and before the trial came on; no further violation of the section were then necessary. We of course do not forget that it is precisely the use of evidence obtained by such divulgence that *Nardone v. United States, supra* (308 U. S. 338) condemned, but the distinction between divulgence of the message by the very act of introducing it, and introducing evidence acquired by past divulgence, is nevertheless critical. For the only possible escape from those authorities which limit to the victim of an unlawful search the objection to evidence procured by the search, lies in the fact that §605 expressly forbids divulgence as well as acquisition—"interception"—while the Fourth Amendment and its implementing statutes forbid only acquisition. When therefore as here the question arises of evidence procured by an earlier unlawful divulgence the parallel between the situation and that of an unlawful search becomes perfect; and it would be a curious result, if a violation of the section were more sweepingly condemned than a violation of the Constitution. Aside from the difference in authority between the two, the wrongs

involved are so different in their heinousness: an unlawful search may be the invasion of the home itself, an outrage which no people will endure which still dares call itself free; the interception of a telephone message, enraging as it is, is not worse than other violations of secrecy which the law countenances.

The only other point which needs extended discussion is the judge's charge. This was long and detailed; he repeatedly advised the jury that they were not to take as authoritative any opinions he might venture as to the facts. He then put before them a number of questions whose answers they might, he thought, find important or even critical in deciding the guilt or innocence of the accused. These he did indeed couch in such a way as to make fairly apparent what answers he would himself have given to them; and it must be owned that the answers were damaging. The questions were, however, the sum of all that could be thought to invade the jury's province, and they occurred in a long charge, prefaced by overabundant caution, as we have said. The situation was thus quite different from that in *United States* v. *Murdock*, 290 U. S. 389—the last pronouncement of the Supreme Court—in which by a divided vote it affirmed the reversal of a conviction in which the judge had told the jury that the prosecution had "proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt" (p. 393). Such an unequivocal declaration upon the very issue had an impact immensely more persuasive than the oblique intimations to be drawn from the questions put to the jury here. The judge did not "distort * * * or add to" the evidence; what he did do was to "comment in order to give appropriate assistance" to the jury. *Quercia* v. *United States*, 289 U. S. 466, 470. Nor is it true that he presented the evidence unfairly. In such cases it is seldom possible to say more in the accused's favor than that he denies any complicity with the chief partici-

pants in the scheme; the real question is how far the prosecution has succeeded in enmeshing him in a web of circumstance strong enough to withstand those denials. While the judge might have pointed out possible holes in that web, "fairness" does not mean neutrality; he was in some measure responsible for the result, and his conclusions—though he really told them none—if presented, without heat or bias were a proper guide to the jury. (The belief very commonly held by judges that a jury is excessively subject to the judge's influence, my own experience at least did not bear out. I found them generally quite robust enough to form their own opinions independently of any indications I might give them of mine.) In our decisions we have repeatedly gone farther than the judge did here. *Safford* v. *United States*, 252 Fed. Rep. 471; *Dillon* v. *United States*, 279 Fed. Rep. 639 (this decision was probably overruled by *United States* v. *Murdock*); *United States* v. *Frankel*, 65 Fed. (2) 285, 288; *United States* v. *Dilliard*, 101 Fed. (2) 829, 835; *United States* v. *Bob*, 106 Fed. (2) 37, 41.

Some of the accused argue that there was no "credible" evidence to sustain the verdict; upon the theory that the testimony of Messman and Garrow was not enough. But the credibility of even such witnesses as they is for the jury; whether their testimony should satisfy all reasonable doubts is not a matter which the courts will review. In the case at bar nobody disputes that a number of persons did actually engage in a wide scheme to defraud the insurance companies; or that all the accused were associated in one way or another with those who concocted it. Whether that was a guilty or an innocent association was the only question left open, and the testimony was ample that it was a guilty one, if the jury chose to believe the witnesses.

As to Elentuch, he was shown to have been active in the conspiracy at least as late as December, 1936, and he did not prove that his connection ended before his first con-

fession which was in July, 1937. The present indictment was filed in March, 1940, and was therefore in season, regardless of the first indictment which it superseded. *United States* v. *Strewl*, 99 Fed. (2) 474, 477 (C. C. A. 2).

Finally, we cannot say that on the preliminary hearing the judge unduly limited examination by the accused. It is extremely difficult to glean from the record just what limits he did draw, and how far the accused meant to complain when he drew any. The Supreme Court in *Nardone* v. *United States, supra,* 341, 342 (308 U. S. 338) clearly meant that the existence of "taps" should not become an excuse for the exposure before trial of all the prosecution's evidence. As in cases of discovery, criminating evidence, or the theft of trade secrets, there is always theoretically a contradiction in inquiring into the existence of facts the propriety of whose disclosure can strictly be determined only after they are known. For such situations there is no *vade mecum* and the judge must feel his way; he need not allow the same searching cross examination that is ordinarily the privilege of the inquiring party. In the case at bar the judge did indeed express himself once or twice in a way that seemed to restrict the examination unduly; but taking his rulings in bulk together with the accused's complaisance we cannot say that he held them on too tight a rein. Besides, in the view we take this point is obviously immaterial for two reasons: the prosecution was not shown to have carried its burden of proving how far the "taps" contributed to Messman's or Garrow's breakdown; and the accused had in any event no standing to prevent the calling of either at the trial.

The other errors alleged require no mention.

Convictions affirmed."